BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Cable Attribution Rules	)	

REPLY COMMENTS OF
TELE-COMMUNICATIONS, INC.

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September 3, 1998

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Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its Reply Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

As demonstrated by TCI's Attribution Comments, the Commission should revise its attribution criteria for the horizontal limit to capture only those ownership interests which confer operational control.[2] Any other approach would sacrifice substantial benefits

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1 Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82, *Notice of Proposed Rulemaking*, FCC 98-112 (rel. June 26, 1998) ("Cable Attribution Notice").

2 That is, interests conveying *de jure* control would be automatically attributed. There should be no attribution for interests less than 10 percent generally. For those interests greater than 10 percent but less than 50 percent, a cable MSO should be permitted to certify that it will not control the cable company in which it has a minority investment generally, and specifically will not do so with respect to programming, personnel, budgets, and technology choices. Influential, as opposed to controlling, interests would not be regarded as

to avoid the potential for harm that is either minimal or nonexistent:

- as demonstrated previously by Charles River Associates ("CRA"),[3] the risk that influential interests will harm competition through the exercise of monopsony or vertical foreclosure is small;

- similarly, the risk that influential interests will harm program diversity is small because, among other factors, the number of MVPDs and programming networks have increased significantly, must carry, program carriage, and other affirmative behavioral restrictions ensure the carriage of a variety of viewpoints, and cable subscribers have more choices than viewers of the traditional broadcast medium;

- an overinclusive attribution threshold will foreclose beneficial ownership interests and impair potential efficiencies (e.g., access to capital and regional clustering); and

- the cost of a case-by-case approach to attribution will necessarily outweigh any minimal risk that competition or diversity will be harmed.

Regarding other cable attribution thresholds, the Commission should:

- increase the attribution threshold for voting stock from 5 percent to 10 percent;

- only attribute stock interests held by institutional investors when they exceed 49 percent;[4] and

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relevant so long as the minority-investor MSO has made the relevant certification.

3 Stanley M. Besen, Daniel P. O'Brien, and John R. Woodbury, Charles River Associates Incorporated, Serge X. Moresi, Department of Economics, Georgetown University, "An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems," (Aug. 14, 1998), Attachment A to TCI's Attribution Comments ("CRA Attribution Analysis").

4 Cf. Comments of Chase Capital Partners at 2 (raise the cognizable ownership benchmark to at least 10%; institutional investor interests should not be attributable if they are less than controlling).

- refrain from adopting the proposed equity and/or debt plus attribution proposal.

In its Reply Comments, TCI responds to the comments of Ameritech New Media, Inc. ("Ameritech"); RCN Telecom Services, Inc. ("RCN"); Consumers Union, Consumer Federation of America, the Center for Media Education, the Office of Communications, Inc. of the United Church of Christ and the Association of Independent Video and Filmmakers, ("CU *et al.*"); Wireless Communications Association ("WCA"); and DirecTV, Inc. ("DirecTV") which argue generally for restrictive cable attribution criteria. As an Appendix to these Reply Comments, TCI attaches an analysis prepared by Charles River Associates Incorporated ("CRA") which rebuts the arguments raised by Ameritech and its economic consultants.[5]

II. COMMENTERS' PREOCCUPATION WITH THE POTENTIAL ANTICOMPETITIVE EFFECTS OF INCREASED MARKET CONCENTRATION IS OVERSTATED.

Ameritech and RCN claim that increased cable concentration will have harmful effects; therefore, restrictive horizontal limit attribution criteria are warranted. In essence, they assert that being big is bad. Similarly, CU *et al.* maintains that cable ownership interests with the potential to influence should be attributed. The commenters are unable to rebut the evidence provided by TCI that relaxation of the horizontal limit attribution criteria is appropriate. As shown below, the Commission should reject the commenters' assertions in their entirety.

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[5] Stanley M. Besen and John R. Woodbury, Charles River Associates Incorporated, "Comments on Dertouzos and Wildman, 'Programming Access and Effective Competition in Cable Television,'" (Sept. 3, 1998) ("CRA Rebuttal Analysis").

A. The Commission Should Reject Ameritech's Assertion That Cable MSOs Are Exercising Monopsony Power To Extract Exclusivity and Inappropriate Volume Discounts.

Ameritech argues that MSOs have monopsony power over programming; they can extract preferential rates and terms, including exclusivity, even from unaffiliated programmers; and consequently, new entrants face a significant cost disadvantage.[6] In addition, Ameritech alleges that vertically integrated MSOs can "price squeeze"[7] all MVPDs which could impair a competitor's profitability.[8] For these reasons, Ameritech argues that the cable attribution criteria (and the horizontal limit) should not be relaxed until the program access rules are substantively modified and alternative MVPDs are permitted to obtain programming on the same terms as those offered to incumbent MSOs. Similarly, RCN contends that the current horizontal limit attribution criteria should be more restrictive (similar to the attribution criteria applicable to the program access rules)[9] because large scale operations increase a cable MSO's anticompetitive incentives.[10]

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6 Comments of Ameritech at 13-19.

7 Ameritech's theory is that vertically integrated firms would maintain high program service prices to protect their cable systems from competition. Id. at 23-24.

8 Ameritech similarly claims that affiliated programmers can structure their rate cards so that only large MSOs can obtain the benefits of volume discounts. Id. at 22. As CRA demonstrates, the evidence provided in support of this position is not reliable. CRA Rebuttal Analysis at 4-11.

9 RCN posits that more restrictive attribution criteria would have prevented, among other things, TCI's interest in Time Warner. However, TCI's investment in Time Warner is through a voting trust, a non-attributable interest under the program access attribution criteria. See 47 C.F.R. § 76.1000(b) (defining an attributable interest in accordance with the

Regarding Ameritech's monopsony power assertion, as noted previously in TCI's Comments, the effect of bargaining by large MSOs on consumers generally is not harmful. In fact, it may benefit consumers. Buyer power can permit a cable operator to negotiate lower prices for programming which benefits consumers because lower negotiated prices will likely be passed along to consumers as a reduced charge for cable service. As previously noted by CRA, "[b]ecause programming fees are typically denominated on a per-subscriber basis, one effect of lower programming fees is to reduce the marginal cost (i.e., the incremental per subscriber cost) of cable service. This effect gives cable operators incentives to reduce the price of cable service."[11] Indeed, the evidence submitted by Ameritech's economic consultants is consistent with this analysis in that it demonstrates that large MSOs charge lower prices and offer more services than do smaller cable operators, to the obvious detriment of consumers. Thus, the

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provisions of 47 C.F.R. § 76.501, except those provisions regarding single majority shareholders, limited partner insulation, and non-voting interests over 5%).

[10] RCN Comments at 8, 11. RCN also claims that MSOs have not provided convincing evidence that increased scale of operations is essential for innovation. Id. at 12. As TCI demonstrated in its Horizontal Ownership Comments, delivering new services such as interactive video and high-speed data to a more geographically focused number of subscribers reduces the per-subscriber costs of expensive file servers, switches, and high capacity storage devices. Moreover, clustering is essential to compete effectively with incumbent LECs and electric utilities because it substantially reduces the costs associated with providing local telephony. See Comments of TCI in MM Docket No. 92-264, at Section III.B.1. (filed August 14, 1998). This issue is addressed more fully in TCI's Reply Comments in the Horizontal Limit.

[11] See CRA Attribution Analysis at 18.

Commission should not rely upon Ameritech's assertions of monopsony power as a basis to avoid liberalizing the horizontal limit attribution criteria.

Ameritech's claim that MSOs will exercise their asserted monopsony power to extract exclusive carriage rights over unaffiliated programmers also lacks merit. Ameritech categorically declares that exclusivity is not procompetitive and is not necessary to encourage investment in new programming. It believes that there is no justification for exclusive programming rights, even when extended by unaffiliated programmers.[12] This assertion is patently false. Indeed, Congress and the Commission have recognized to the contrary by permitting exclusive arrangements under a variety of circumstances.[13] Ameritech's preoccupation with

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12 Comments of Ameritech at 16-17. Taking Ameritech's blanket assertion to its logical conclusion, exclusivity is inappropriate under any conditions, whether practiced by a large MSO or a small, insurgent competitor. This argument is contrary to sound economic theory, good business practices, and Commission precedent. See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299, at ¶ 66 (1988) ("exclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting. Exclusivity enhances the ability of the market to meet consumer demands in the most efficient way; this is a sufficient reason for allowing all media the same rights to enter into and enforce exclusive contracts").

13 See 47 U.S.C. § 548(c)(2)(C), (D) (prohibition against exclusive arrangements limited to vertically integrated programmers in unserved areas; permitting exclusivity for vertically integrated programmers in served areas if in the public interest as well as permitting exclusivity under all circumstances when there is no vertical relationship); Program Access Order, MM Docket No. 92-265, *First Report and Order*, 8 FCC Rcd. 3359, at ¶ 65 (1993)("we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely

exclusivity also fails to account for the fact that exclusive arrangements promote efficiency. As CRA explains, there are many potential efficiencies associated with exclusive arrangements, including, among other things, reduced transaction costs (e.g., dealing with only one distributor for a market), reduced distribution costs for the MVPD (this cost savings would accrue to the most efficient distribution of the programming), and the elimination of promotional free-riding (creating incentives to promote programming more zealously because the promotion benefits run to the distributor and not its competitors).[14] In addition, as a factual matter, it does not appear that cable operators are obtaining exclusivity as a matter of course.[15]

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heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market"); id. ("it is possible that local or regional news channels could be economically unfeasible absent an exclusivity agreement"); New England Cable News, CSR-4190-P, *Memorandum Opinion and Order*, 9 FCC Rcd. 3231, at ¶ 37 (1994) (exclusive carriage of a start-up regional venture held appropriate for a vertically integrated MSO "due to the regional nature and limited distribution potential of" the programming at issue).

14 CRA Rebuttal Analysis at 18-20; see also Comments of Tele-Communications, Inc. in MM Docket No. 92-265 (filed Jan. 25, 1993), CRA Attachment entitled "Exclusivity and Differential Pricing for Cable Programming Services," at 26-41 (Jan. 25, 1993) ("CRA 1993 Analysis").

15 CRA Rebuttal Analysis at 17 ("almost no important programming is exclusive to cable"). Moreover, Ameritech's claim that Classic Sports Network and MediaOne were entering into an exclusive programming arrangement as of January 1, 1999, is no longer the case. See "MediaOne Ends Fight Over Classic

Congress and the Commission expressly prohibit cable operators from conditioning the carriage of programming on exclusivity.[16] This statutory prohibition creates a remedy in those rare situations where exclusivity may have anticompetitive consequences. Given the current state of the law, Ameritech's remedial proposals are unnecessarily duplicative.

The Commission should also reject Ameritech's assertion that MSOs can use their asserted monopsony power to extract programming at significantly lower costs. Ameritech's demand for discount parity ignores the fact that one firm receiving cost advantages from being large does not create barriers to entry or expansion of other firms, and likely does not diminish competition. Costs that a firm incurs as it achieves the scale necessary to attain such concessions are part of its normal business investment. Simply stated, if a firm such as Ameritech is unable to achieve sufficient scale, this should not be attributed to high programming costs, but rather to its unpopularity with consumers.

Moreover, the data Ameritech relies upon to support its claim that MSOs receive excessive price concessions from unaffiliated

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[16] See 47 U.S.C. § 536(a)(2); 47 C.F.R. § 76.1301 ("No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.") (emphasis added); see also Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, *Memorandum Opinion and Order*, 9 FCC Rcd. 4415, ¶ 24 (1994) (amending the program carriage rules to permit MVPDs to file complaints under 47 U.S.C. § 536).

programmers is unreliable.[17] To illustrate, fees paid by cable operators and other MVPDs can vary substantially based on other factors not considered by Ameritech, including "length of contract, tier and channel position commitments, limitations on removing the service from the operator's channel lineup, rollout commitments, amount and type of promotional or advertising services provided by a distributor, whether the program is purchased separately or as part of a package, timing of payments, date of purchase (particularly purchase at launch), and penetration guarantees. Without taking these, and other, differences into account, it simply is not possible to compare the prices paid by different operators."[18]

Ameritech also claims that the discounts large MSOs receive are not justified by distribution cost savings and that transactional "savings cannot account for more than a minute fraction of the differences in network license fees paid by cable entrants and large MSOs;"[19] therefore, the differences result from bargaining power only.[20] This is simply wrong. Transaction cost savings (dealing with only one distributor for many markets) are

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17 See CRA Rebuttal Analysis at 4-8 (Among other things, CRA notes that: the number of subscribers needed to qualify for a discount can be quite modest, as little as 1000 subscribers; and a comparison of 1997 rate card fees and 1997 average rates is inappropriate because the average rate includes program service contracts that were previously entered into and reflect the lower prices existing at that time).

18 CRA Rebuttal Analysis at 8.

19 Comments of Ameritech at 19.

20 Id. at 18, n. 46.

legitimate and provide significant benefits in terms of lower per subscriber costs.[21] By contrast, extending the same discounts to MVPDs with fewer subscribers and therefore with no comparable cost savings (with no similar transactional cost savings) ultimately will result in higher programming prices for all MVPDs (including the large MSO), and higher prices to consumers.

Moreover, as explained by CRA, there are other sources of cost-based differences not mentioned by Ameritech, which must be considered such as (1) an increase in the national reach or penetration which is attractive to programmers in their efforts to bring in advertising;[22] (2) providing a screening function for smaller MSOs;[23] and (3) the fact that larger MSOs may engage in more promotional activities for the programming services carried on their systems.[24]

Finally, Ameritech provides no evidence that the discounts are the result of MSO's exercise of bargaining leverage.[25] Indeed, Ameritech's evidence demonstrates that "the increased carriage of vertically integrated services is *in addition to* and *not at the*

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[21] CRA 1993 Analysis at 6-7.

[22] CRA Rebuttal Analysis at 10. A programmer will be willing to decrease per subscriber fees if it is able to reach a larger audience through one carrier. Id.

[23] That is, a large MSO's decision to carry a new service or to renew carriage of an existing service can signal to smaller operators that the service is attractive to subscribers. CRA Rebuttal Analysis at 10.

[24] Id.

[25] Id. at 10-11.

expense of non-vertically integrated services."[26] Even if the discounts did result from bargaining power, CRA notes that this does not mean that the higher prices that competitive MVPDs pay would stifle competition.[27] Bargaining power is not equivalent to market power. If bargaining power does not reduce output, there is little basis to be concerned that an MSO's buying power significantly reduces competition. As previously noted by one of Ameritech's experts, a larger MSO will take into account that paying too little for programming may reduce programming supply and therefore will refrain from taking such action.[28] In fact, Ameritech's evidence demonstrates clearly that "large cable operators not only charge lower prices but they also offer more services than do small operators."[29]

The Commission should also reject Ameritech's "price squeeze" argument. A vertically-integrated MSO is unlikely to engage in a price squeeze (i.e., raise all of its programming rates, including to itself), even if the Commission relaxes significantly the horizontal limit attribution thresholds. As CRA concludes, "current integrated cable operators are unlikely to have either the

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26 Id. at 13 (emphasis in original).

27 CRA Rebuttal Analysis at 14-15. As noted by CRA, "carrying more services and charging lower prices can hardly be considered evidence of anticompetitive behavior." Id. at 12.

28 See CRA Rebuttal Analysis at 15-16 (citing B.M. Owen and S.S. Wildman, Video Economics, at 243 (Harvard Univ. Press 1992)).

29 Id. at 15. Moreover, in this case, there should be no reduction in output, considering the explosive growth of programming sources.

ability or the incentive to disadvantage rivals in this way, a situation that can be expected to persist if the FCC relaxes the horizontal ownership limits and attribution rules."[30]

No individual MSO likely has the ability to engage in a price squeeze because there are typically many substitutes available for any of the services affiliated with an MSO. The affected rival can substitute one of the other services for those for which the price has increased. No individual MSO likely has the incentive to engage in a price squeeze once the MSO accounts for the loss in program revenues experienced from a reduction in carriage by rival and non-rival services. In addition, because MSOs typically have only a partial ownership interest in affiliated program services, they will regard much of the increased price of the service as a real cost increase for their cable systems and not as a mere transfer as suggested by Ameritech. The cost increase further reduces the likelihood that the MSO will have a significant or any incentive to engage in a price squeeze. For these reasons, among others, the Commission should reject Ameritech's price squeeze assertions.[31]

To summarize, the Commission's should reject Ameritech's proposal to delay revisiting the horizontal limit attribution criteria:

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[30] Stanley M. Besen and John R. Woodbury, Charles River Associates Incorporated, "A Response to Ameritech New Media's Allegations of a 'Price Squeeze' by Vertically-Integrated Cable Operators," at 1 (Sept. 3, 1998), attached as Appendix B to TCI's Attribution Reply Comments.

[31] Id. at 1-4.

> the alleged inadequacy of the Commission's program access rules can hardly provide a justification for the Commission to delay a reassessment and relaxation of its cable ownership rules. The discounts granted to large cable operators are likely based on either the cost savings associated with providing a service to a large MSO or from superior bargaining power that does not adversely affect either the number or quality of program services available. . . . consumers would clearly benefit if the rules were immediately relaxed to the extent that the current rules have artificially constrained the size of cable operators. Moreover, there are few services that are available to cable but not to cable overbuilders or other competing MVPDs. If anything, the limited extent of permissible program exclusivity -- which is to say, virtually none currently for cable operators -- likely harms the development and growth of new and existing services.[32]

B. The Commission Should Reject RCN's Claim That Horizontal Concentration Increases A Cable MSO's Incentives To Forestall Competition and Create Entry Barriers.

RCN similarly claims there are anticompetitive effects associated with increased cable concentration. RCN essentially asserts that cable horizontal concentration *per se* increases a cable MSO's incentives to stall local competition and to create entry barriers to alternative MVPDs. However, RCN fails to provide any evidence of increased incentives to foreclose local competition as a result of TCI's clustering strategies. In fact, these concepts are unrelated. That is, a cable MSO's decision to invest in other cable operators has no effect on local competition. RCN fails to recognize that increased horizontal concentration raises essentially vertical, not horizontal issues.[33]

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[32] CRA Rebuttal Analysis at 21.

[33] See TCI's Attribution Comments at Sections II.B. (cable operators do not generally compete locally) and III.C.2. (there is no possibility that acquiring an interest in another cable system will reduce the level of competition among the systems for subscribers).

To the extent that RCN is concerned with vertical foreclosure, the empirical evidence to date demonstrates that the likelihood of vertical foreclose is small. As explained previously by CRA:

> the bulk of the empirical evidence indicates that vertically integrated cable operators do not disfavor non-pay program services in which they do not have ownership interests. In particular, carriage rates for these services by vertically integrated systems are generally not lower than those of systems that are not vertically integrated. Moreover, even where the carriage rates by vertically integrated operators are found to be lower, the differences are generally small when compared either to the universe of cable subscribers or to the total number of subscribers with access to the service.[34]

As previously noted, the econometric study prepared by Ameritech's economic experts demonstrates that large vertically integrated MSOs offer lower prices and more services than smaller unintegrated MSOs.

Thus, notwithstanding ability or incentive, vertically-integrated cable operators are not engaging in vertical foreclosure. Moreover, if a cable operator attempts to deny access to a program service in which it has no interest, that service now has alternative outlets such as DBS, thereby limiting a cable operator's ability to vertically foreclose.

C. The Commission Should Reject CU *et al.*'s Proposal to Attribute Influential Interests.

CU *et al.* maintains that all of the cable attribution rules should be more stringent than those applicable to the broadcast industry. CU *et al.* believes that "direct ownership is not

[34] CRA Attribution Analysis at 31.

essential to exercise power over programming markets."[35] CU *et al.* also advocates repeal of the single majority shareholder exception for cable interests and supports the adoption of a modified equity and/or debt plus proposal.[36]

It is clear that CU *et al.'s* proposals are motivated by its concern over interests which convey the potential for influence. CU *et al.* is proposing essentially to attribute all interests. This result, though, fails to benefit consumers because it stifles investment and inhibits technology innovation and programming development.

As TCI demonstrated in its initial Attribution Comments, the Commission, in its consideration of horizontal limit attribution rules, need not be concerned with interests which convey the ability to influence.[37] There are serious problems with crafting attribution thresholds that block inappropriate influence yet still promote beneficial ownership interests. To consider influence issues accurately requires the use of case-by-case determinations which, as discussed below, impose significant administrative and regulatory burdens. Moreover, as TCI previously demonstrated, given the purposes underlying the horizontal limit, and the fact that the potential for harm to competition is low even if only

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35 Comments of CU *et al.* at 3.

36 Id. at 3-5. CU *et al.'s* observation that debt interests and other rights are far too complex for the Commission to parse, id. at 4, is at odds with its endorsement of the equity and/or debt plus proposal.

37 See TCI's Attribution Comments at Section III.C.

controlling interests are attributed, on balance, horizontal limit attribution criteria premised upon operational control are appropriate.[38]

CU *et al.* also appears to be operating under the misconception that key differences between the broadcast and cable industries justify more restrictive cable attribution rules.[39] CU *et al.* offers no evidence to contradict TCI's (and CRA's) explanation that the lack of competition between cable operators in a local market justifies less restrictive horizontal attribution criteria. As noted by CRA, among other things, "there is no risk that the investment of one cable system in another will result in higher prices to subscribers and advertisers as a consequence of the suppression of direct competition between the two."[40] For this reason, CRA concludes that the cable attribution rules should be more lenient than the broadcast rules.[41]

III. COMMENTERS' PROPOSALS TO FURTHER RESTRICT THE PROGRAM ACCESS ATTRIBUTION CRITERIA SHOULD BE REJECTED.

WCA urges the Commission to clarify that Section 76.1000(b)'s definition of attributable interest "applies to an entity's level of ownership in a 'cable operator,' and that where that entity has an 'attributable interest' in both a cable operator and a satellite-delivered cable network, that network will be subject to

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38 Id.

39 Comments of CU *et al.* at 2-3.

40 CRA Attribution Analysis at 17-18.

41 Id. at 18.

the Commission's program access rules."[42] The Commission should decline to modify its rules as requested by WCA because (1) the "clarification" sought by WCA is inconsistent with Section 628 of the Communications Act of 1934, as amended ("Act"),[43] and (2) as demonstrated by TCI in its Attribution Comments, the Commission should be far less concerned with partial, potentially influential interests in the vertical context.

Certain provisions of Section 628 apply to a "cable operator which has an attributable interest in a satellite cable programming vendor;"[44] others apply to a "satellite cable programming vendor in which a cable operator has an attributable interest."[45] Where such limitations appear, WCA desires that the Commission find that the statutory provisions in question apply not only where a cable operator has an attributable interest in a satellite cable programming vendor, but also where a third party owns an attributable interest in both a cable operator and a satellite cable programming vendor. Because such an interpretation would be contrary to the plain language of the statute, WCA's request should be denied.[46]

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42 Comments of WCA at 4-5.

43 47 U.S.C. § 548.

44 47 U.S.C. § 548(c)(2)(A).

45 47 U.S.C. § 548(c)(2)(B).

46 <u>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</u>, 467 U.S. 837, 842-843 (1984) (If, using traditional tools of statutory construction, the court concludes that the statute is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

Congress carefully defined the circumstances to which the above-referenced program access provisions are directed; the program access provisions do not address vertical integration generally. Rather, Congress specifically defined the circumstances in which it considered vertical integration to be present for the purpose of the program access rules: the provisions addressing vertical integration are only implicated where a "cable operator" has an attributable interest in a "satellite cable programming distributor." Had Congress desired to apply the program access rules to vertical integration in all circumstances, it could have applied Section 628(c)(2)(B) (for example) to "vertically integrated satellite cable programming vendors;" thereby leaving the question of what constitutes vertical integration to the Commission's discretion. Congress did not choose this general approach and its specification of when vertical integration exists for the purpose of the program access rules should not be disturbed by the Commission.

The term "cable operator" has been a defined term under the Act since the Cable Act of 1984;[47] the Commission has interpreted the definition[48] and these interpretations have been tested in the Courts.[49] Similarly, the term "satellite cable programming vendor"

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[47] See 47 U.S.C. § 522(5).

[48] See, e.g., Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, *Report and Order*, 58 Rad. Reg. 2d (P & F) 1, at ¶¶ 5-9 (1985).

[49] See, e.g., NCTA v. FCC, 33 F.3d 66, at 73-75 (1994).

is defined in Section 628.[50] Thus, Congress has delimited with great precision the applicability of those provisions of Section 628 that are directed to vertical integration. The Commission is, of course, free to set the benchmark above which a cable operator's interest in a satellite cable programming vendor will be attributed. However, the Commission is not free to extend the applicability of such provisions beyond situations in which a "cable operator" has an attributable interest in a "satellite cable programming vendor."

Even if the statute could be read in a manner that allowed the Commission to find vertical integration for the purpose of Section 628 where a third party holds an "attributable" interest in both a cable operator and a satellite cable programming vendor, the Commission should decline to take such action. The program access rules, like the horizontal limit, are premised upon vertical concerns such as monopsony and vertical foreclosure. As demonstrated in TCI's Comments in this proceeding, the potential anticompetitive effects associated with vertical concerns do not warrant stringent Commission regulation. Thus, partial, non-controlling ownership interests, which have ambiguous competitive effects, simply are not likely enough to warrant these concerns to justify application of the program access rules.

WCA argues that the Commission should consider on a case-by-case basis whether certain "unique and substantial non-ownership relationships" rise to the level of a "de facto attributable

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[50] See 47 U.S.C. § 548(i)(2).

interest."[51] TCI recognizes that case-by-case review of ownership interests would be more effective in determining which ownership interests should be attributed; however, case-by-case determinations are costly both in terms of the direct costs associated with making individualized determinations, as well as those costs imposed generally when the Commission fails to establish bright-line criteria.[52] Self-certification, an honor system approach, will permit the Commission to avoid the unnecessary expenses associated with ubiquitous case-by-case adjudications.[53]

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[51] Comments of WCA at 17.

[52] See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap: Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket No. 96-59 and GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd. 7824, at ¶ 120 (1996) ("[e]stablishing a control test would require us to conduct frequent case-by-case determinations of control, which are time-consuming, fact-specific, and subjective.")

[53] See Statement of William E. Kennard, Chairman, Federal Communications Commission, before the Subcommittee on Commerce, Justice, State and the Judiciary Committee on Appropriations, United States Senate, on the Federal Communications Commission's Fiscal Year 1999 Budget Estimates, 1998 FCC LEXIS 1341 (Mar. 19, 1998) ("it is important for the Commission to adopt a new paradigm for enforcement that relies more on companies to certify that they are in compliance with our regulations, but with increased enforcement for non-compliance. Swift, predictable, and sufficient enforcement is critical as we move toward competition").

IV. CONCLUSION.

Based on the foregoing, TCI respectfully urges the Commission to relax the cable attribution thresholds consistent with its proposals.

Respectfully submitted,

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COMMENTS ON DERTOUZOS AND WILDMAN, "PROGRAMMING ACCESS AND EFFECTIVE COMPETITION IN CABLE TELEVISION"

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